No. 18-431

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Legislatures typically define conduct as criminal based on what a defendant actually did, not what a judge imagines that a theoretical defendant might ordinarily do. Respondents nonetheless insist that this Court not only should, but *must*, construe 18 U.S.C. 924(c)(3)(B) as an extraordinary deviation from that practice. But while constitutional and practical concerns required the ordinary-case categorical approach in classifying prior convictions, that approach has no natural place in defining instant offense conduct. Nothing requires construing Section 924(c)(3)(B) to be a fish out of water—particularly when doing so would render it unconstitutionally vague.

Respondents' contrary position—which adopts the premise (*e.g.*, Br. 42) that application of a substantial-risk standard by a jury is *itself* unconstitutionally vague—is unsustainable. They invite further litigation over Section 924(c) prosecutions, other similarly-worded

federal statutes, and any efforts Congress might make to clarify that Section 924(c)(3)(B) requires a circumstance-specific approach. This Court should decline respondents' invitation to take a permanent red pen to critical parts of Title 18, and should instead respect Congress's efforts to criminalize conduct—like respondents' own—in which guns and crime form a dangerous mix.

A. The Definition Of A "Crime Of Violence" In 18 U.S.C. 924(c)(3)(B) Focuses On Actual, Not Imagined, Offense Conduct

Section 924(c)(3)(B) is best read to condition the criminality of a defendant's conduct on normal jury fact-finding, not judicial fictionalization. Everyone agrees that in a prosecution under Section 924(c), the jury must find (or the defendant must admit) that the defendant engaged in conduct that is a separate federal felony and that he employed a firearm in connection with that offense. See 18 U.S.C. 924(c)(1)(A); *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). As the government's opening brief explained (Br. 20-44), the jury naturally would, and readily could, simultaneously determine from the same evidence whether that underlying offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B).

1. The text of Section 924(c)(3)(B) is best read to require a circumstance-specific approach

Neither respondents nor their amici identify a single self-contained federal or state law that explicitly defines the actus reus of a crime based on the imagination of the judge, rather than the evidence before the jury. Nor do

they identify any sound reason, inherent in Section 924(c) itself, to construe it as an outlier in that regard.

a. A determination of whether the facts of a present offense create a "substantial risk" is exactly the type of circumstance-specific factfinding in which juries regularly engage. See Gov't Br. 23-25. In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the government provided the Court with an appendix of "over two hundred state statutes that impose criminal liability for conduct that presents a 'risk,' 'substantial risk,' 'grave risk,' or 'unreasonable risk' of injury to others." Gov't Br. at 23, *Johnson*, *supra*, No. 13-7120 (*Johnson* Gov't Br.); see *id.* Appx. B. The Court concluded that "almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Johnson*, 135 S. Ct. at 2561. The Court's omnibus conclusion was presumably informed by the natural understanding that such terms, when they describe instant offense conduct, call for an inquiry into *that* conduct—not "an idealized ordinary case of the crime," *ibid.*

That is the best reading of Section 924(c)(3)(B)'s substantial-risk inquiry as well. Section 924(c)(3)(B) applies only "[f]or purposes of" Section 924(c) itself, and defines the "crime of violence" that a defendant "uses or carries" a firearm "during and in relation to" or "possesses" a firearm "in furtherance of." 18 U.S.C. 924(c)(1)(A) and (3). A defendant does not employ a firearm in connection with an abstract crime; he employs it in connection with *his* crime. Likewise, Section 924(c)'s requirement that a defendant's sentence be consecutive to "any term of imprisonment imposed for the crime of violence," 18 U.S.C. 924(c)(1)(D), necessarily refers to the sentence for his own particular crime

of violence, not an abstraction. Respondents' suggestion (Br. 18) that "crime of violence" instead refers to a "statute[]," because Section 924(c) at one point parenthetically references a "crime of violence * * * that provides for an enhanced punishment," 18 U.S.C. 924(c)(1)(A), is nonsensical. Even respondents do not believe that a "crime of violence" is *wholly* abstract—they would just define it based on judicially imagined facts rather than real ones.

b. The subsection-specific definition of "crime of violence" supports the commonsense inference that the relevant facts are jury findings, not the judge's brainchild. Section 924(c)(3) defines a "crime of violence" as an "offense that is a felony," 18 U.S.C. 924(c)(3), that either has a particular "element" that necessarily must exist in every case, 18 U.S.C. 924(c)(3)(A), or, alternatively, presents a "substantial risk" of violence in a particular case, 18 U.S.C. 924(c)(3)(B). Under each alternative, the jury is finding that the defendant's conduct was a "crime of violence"—either because it finds an element that always involves force (or a threat or attempt thereof) or because it finds that the conduct at issue involved a substantial risk of force.

Contrary to respondents' contention, that natural understanding of Section 924(c)(3) does not give "'two contradictory meanings'" to the terms "felony" and "offense," Br. 14 (citation omitted). This Court has recognized that words like "felony" and "offense" can simultaneously refer to *both* the facts of a particular case and the legal prohibition at issue. *Nijhawan* v. *Holder*, 557 U.S. 29, 34, 38-39 (2009); *United States* v. *Hayes*, 555 U.S. 415, 420-426 (2009); Gov't Br. 21-22. Indeed, the term "offence" in the Double Jeopardy Clause has

long been understood to encompass both the defendant's "'act or transaction'" and the "elements" of the relevant "'statutory provision[].'" *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977) (quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

c. The conventional jury-focused understanding of the statutory language is reinforced by Section 924(c)(3)(B)'s reference to whether the requisite risk arises "in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). In the context of a criminal prosecution, the "course of committing the offense" most plainly refers to the defendant's own offense conduct. See Gov't Br. 26-27. When a real-world course of conduct is already before the jury, it would be quite peculiar to require the judge to invent one. As respondents note (Br. 21), the Court in *Sessions* v. *Dimaya*, 138 S Ct. 1204 (2018), considered whether the course-of-commission phrase, if viewed as a temporal limitation on judicial invention, could (in combination with other factors) sufficiently cabin the inquiry so as to render such invention constitutionally sound. *Id.* at 1219. But no Justice in *Dimaya* suggested that the phrase *counseled in favor of* judicial imagination, rather than jury factfinding. See *id.* at 1216-1218 (plurality opinion) (omitting reference to that phrase in construing 18 U.S.C. 16(b)); see also *Leocal* v. *Aschroft*, 543 U.S. 1, 7 (2004) (focusing on other language in Section 16(b)).

Similarly, respondents do not dispute that Congress has often employed the word "involves" when it "require[s] looking into a defendant's underlying conduct rather than a hypothetical or idealized offense." *United States* v. *Douglas*, 907 F.3d 1, 12 (1st Cir. 2018); see Gov't Br. 27-30. Respondents' reliance (Br. 21) on the

"present-tense use" of that verb to support a "categorical inquiry" is misplaced. Like other federal criminal prohibitions, Section 924(c) refers to *all* offense conduct in the present tense, see, *e.g.*, 18 U.S.C. 924(c)(1)(A) ("uses," "carries," "possesses"). Respondents note (Br. 21, 46) that a pending bill would amend Section 924(c)(3)(B) to use the past tense. But even assuming that switching tenses would in itself clarify Congress's intent to submit offense conduct to the jury, this Court "routinely construe[s] statutes to have a particular meaning even as [it] acknowledge[s] that Congress could have expressed itself more clearly." *Torres* v. *Lynch*, 136 S. Ct. 1619, 1633 (2016).

d. Finally, the phrase "by its nature" can readily refer to conduct, rather than an abstraction. See Gov't Br. 30-31; see, *e.g.*, 34 U.S.C. 20911(7)(I) (referring to "conduct that by its nature is a sex offense against a minor"); *United States* v. *Price*, 777 F.3d 700, 708 (4th Cir.) (joining the Eleventh Circuit in interpreting that language to be circumstance-specific), cert. denied, 135 S. Ct. 2911 (2015); see also, *e.g.*, 18 U.S.C. 2281a(a)(1)(A) (referring to whether an "act" "by its nature" has the "purpose * * * to intimidate"); *H. J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (referring to "past conduct that by its nature projects into the future"). Nobody disputes that "by its nature" refers to the normal or characteristic qualities of *something*. See Resp. Br. 15. And nothing suggests that the "something" must be the platonic ideal of a crime rather than the real crime before the jury. Although covered by the same (indivisible) statute, 18 U.S.C. 1201, kidnapping by pistol-whipping is "by its nature" different from kidnapping by trick, even if the second kidnapper has a gun in

his glove compartment because he is driving the victim through a dangerous neighborhood.

Respondents are thus incorrect (Br. 17) that the phrase "by its nature" would be "superfluous" if Section 924(c)(3)(B) referred to real-world conduct. To the contrary, it limits the inquiry to the offender's underlying conduct, while foreclosing consideration of extraneous facts, like his personal proclivity toward or against violence. See Gov't Br. 30-31. It also ensures that the mere use, carrying, or possession of a firearm, without more, is insufficient to turn an offense into a crime of violence. A defendant who merely prepares false tax returns, for example, is not committing a "crime of violence" simply because he has a violent temper or keeps a gun under his desk for protection. Instead, the defendant's employment of a firearm must "up[] the ante," *Rosemond* v. *United States*, 572 U.S. 65, 80 (2014), by adding to risk that would exist even if no weapon, or a different weapon, were employed.

Respondents disregard the important function that "by its nature" serves—ensuring that the defendant employed a firearm in connection with conduct that was *otherwise* dangerous—when they caricature (Br. 41) the circumstance-specific approach as potentially bringing "*any* felony" within Section 924(c)'s scope. Respondents' observation (Br. 17-18) that a handful of jury instructions have omitted the phrase "by its nature" suggests, at most, that it is not necessary in every case (*e.g.*, because no extraneous evidence would lead the jury astray). Jury instructions (which are for laypeople) do not invariably parrot every word of the statutory text, and salutary efforts to simplify the jury's deliberations do not suggest that the jury should not deliberate on the issue at all.

2. No precedential or historical considerations favor an ordinary-case categorical approach to Section 924(c)(3)(B)

Because the text and jury-trial context of Section 924(c) would not in themselves signal a sharp departure from standard methods of proof, respondents' argument relies heavily on path dependency—*i.e.*, that because the ordinary-case categorical approach has applied to *other* statutes, it should apply to Section 924(c)(3)(B) as well. In making that argument, respondents invite this Court into the same trap that many lower courts—and the government itself—fell into for many years. Before *Johnson* and *Dimaya* held that the ordinary-case categorical approach is unconstitutional, it was understandable, and not unreasonable, to superimpose that approach on Section 924(c)(3)(B), notwithstanding its uncomfortable fit in the jury-trial context. But that course ceases to make sense once it is evident that it leads over a cliff. On due consideration, it is clear that the reasons for adopting an ordinary-case categorical approach in other contexts do not apply to Section 924(c)(3)(B), and nothing suggests that Congress either anticipated or mandated an interpretation that would render the provision unconstitutionally vague.

a. The practical and constitutional concerns that animated the adoption of the categorical approach to *classifying prior convictions* have no relevance to Section 924(c)(3)(B), which *describes the instant offense*. See Gov't Br. 40-44. In the prior-conviction context, the ordinary-case categorical approach obviates the difficulties of relitigating prosecutions from long ago, *Moncrieffe* v. *Holder*, 569 U.S. 184, 200-201 (2013), and "avoid[s] the Sixth Amendment concerns that

would arise from sentencing courts' making [the] findings of fact" necessary to do so, *Dimaya*, 138 S. Ct. at 1217 (quoting *Descamps* v. *United States*, 570 U.S. 254, 267 (2013)).

Respondents do not dispute that those concerns are entirely absent in the context of Section 924(c)(3)(B). Nor do they dispute that "'identical language may convey varying content' based on context." Br. 30 (quoting *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion)). Instead, they unsustainably attempt to minimize the role of practical and constitutional concerns in this Court's categorical-approach decisions. They note, for example, that the Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), viewed a categorical approach as "the 'only plausible' reading" of the provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), that included the clause that was later invalidated in *Johnson*. Br. 32 (quoting *Taylor*, 495 U.S. at 602). But *Taylor* focused primarily on the term "burglary," 18 U.S.C. 924(e)(2)(B)(ii), not any language of the sort at issue here, and its statement was preceded by the Court's determination that "the practical difficulties and potential unfairness of a factual approach" to classifying prior convictions "are daunting." 495 U.S. at 601.

Respondents repeatedly quote (Br. 2, 6, 10, 23, 32, 36) the *Dimaya* plurality's statement that 18 U.S.C. 16(b) "has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (citation omitted). But that statement came alongside the plurality's observations that a "fact-based" approach would be "utter[ly] impracticab[le]" and "would generate its own constitutional questions." *Id.* at 1217-1218 (citation omitted); see *Johnson*, 135 S. Ct. at 2562. And to the extent that the Court's

decision in *Leocal*, *supra*, held that an ordinary-case categorical approach applies to 18 U.S.C. 16(b), it treated the text as describing a "conviction," not the conduct underlying a crime the jury is currently considering. 543 U.S. at 7; cf. *Dimaya*, 138 S. Ct. at 1217 (plurality opinion) (describing *Leocal* in terms of prior convictions). At a minimum, nothing in the Court's precedents precludes looking at Section 924(c)(3)(B) with fresh eyes before adopting a contextually anomalous and constitutionally fatal interpretation.

b. Similarly, and contrary to respondents' contention (Br. 24-30), nothing in the history of Section 924(c) shows that Congress required—or necessarily even anticipated—such an interpretation. The reports addressing the relevant amendments to Section 924(c) contain no mention of the categorical approach or judicially imagined "ordinary cases." Respondents nonetheless insist that Congress implicitly mandated that approach because (1) it intended Section 924(c)(3)(B)'s subsection-specific "crime of violence" definition to march in lockstep with the general definition in Section 16(b), and (2) it necessarily understood Section 16(b) to incorporate the ordinary-case categorical approach, even in the context of jury trials. Each of those essential premises is incorrect.

First, although the original 1984 version of Section 924(c) relied on Section 16's definition of "crime of violence," Congress in 1986 intentionally *separated* the provisions by adding a new "crime of violence" definition for Section 924(c) that applied solely "[f]or purposes of this subsection." Firearm Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457; see Gov't Br. 35-37. Respondents err in asserting (Br. 24) that, because the language of Section

924(c)(3)(B) is nearly identical to Section 16(b)'s, Congress's decision to sever the two provisions was meaningless. Courts generally presume "that Congress contemplates a change whenever it amends a statute," *United States* v. *Wilson*, 503 U.S. 329, 336 (1992), and respondents identify no reason for the decoupling other than to put the provisions on different tracks. Respondents posit that Congress might have added the new "crime of violence" definition because it was adding a new definition of "drug trafficking crime." Br. 27 (citation omitted). But in the same legislation, Congress added a new definition of "drug trafficking crime" to 18 U.S.C. 929 *without* adding a subsection-specific "crime of violence" definition. See FOPA § 108, 100 Stat. 460; Gov't Br. 37.

The natural inference from the differential treatment of Sections 924 and 929 is that Congress wanted Section 924(c)'s subsection-specific "crime of violence" definition to stand on its own, without the need to consider the interpretation and application of Section 16 in unrelated contexts, including the classification of prior convictions. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Respondents err in suggesting (Br. 32) that such severance was unnecessary because Section 16 initially applied primarily to "present offenses." Respondents' account (Br. 26, 31-32) disregards that, for example, the Sentencing Commission was required to incorporate into the Sentencing Guidelines enhanced penalties for defendants with prior convictions for "crime[s] of violence," Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 217(a), 98 Stat. 2021 (28 U.S.C. 994(h)), and that courts were required to determine whether juvenile offenders had prior convictions for "crime[s] of violence," Comprehensive Crime

Control Act of 1984, Pub. L. No. 98-473, Tit. II, Pt. A, § 1202, 98 Stat. 2151 (18 U.S.C. 5038(f)).

Even assuming Congress specifically intended a categorical approach to Section 16, its decision to sever Section 924(c) from Section 16 invites a context-specific construction of Section 924(c)(3)(B) tailored to the "purposes of [Section 924(c)]," 18 U.S.C. 924(c)(3). Respondents' reliance (Br. 14) on *Clark* v. *Martinez*, 543 U.S. 371 (2005), in which the Court determined that a *single* instance of language in a *single* provision could not simultaneously have two different meanings, *id.* at 378, is misplaced. The "presumption that identical words * * * are intended to have the same meaning * * * is not rigid and readily yields whe[re] there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed * * * with different intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) (citations omitted). Here, Congress extensively rewrote Section 924(c), including by adding its own specific definition of "crime of violence," appearing in the context of a provision requiring a jury trial. Had Congress, irrespective of context, wanted Section 16 to define "crime of violence" under Section 924(c), it would have left Section 16 as the definition of "crime of violence" under Section 924(c).

Second, even if respondents were correct that a fresh-grown provision *could* "bring[] the old soil with it," Br. 28 (citation omitted), Congress here would not have been certain of the old soil's consistency. The ordinary-case categorical approach was far from well-established when Congress enacted Section 924(c)(3)(B). See Gov't Br. 35-37. Respondents identify (Br. 26-27, 31) only *one* per curiam circuit decision, *United States*

v. *Diaz*, 778 F.2d 86 (2d Cir. 1985), that had directly considered the application of Section 16(b) before Congress enacted Section 924(c) in May 1986. That "represent[s] neither a settled judicial construction, * * * nor one which [a court] would be justified in presuming Congress * * * impliedly approved," *United States* v. *Powell*, 379 U.S. 48, 55 n.13 (1964). To the contrary, the enactment of Section 924(c)(3)(B) was explicitly meant to *abrogate Diaz*'s holding (that drug trafficking crimes were not "crime[s] of violence"). See 132 Cong. Rec. E1390-02 (1986); 131 Cong. Rec. S16903-03 (1985). Nipping that decision in the bud cannot be viewed as codifying it in any respect.

Even after Section 924(c)(3)'s enactment, both the Sentencing Commission and, in some cases, the government continued to read the relevant language to invite a circumstance-specific approach. See, *e.g.*, Sentencing Guidelines § 4B1.2 comment. (n.1) (1988); Gov't Br. 4-15, *United States* v. *Springfield*, 829 F.2d 860 (9th Cir. 1987). Respondents note (Br. 29-30) that *later* Congresses have not intervened in the general adoption of the ordinary-case categorical approach to Sections 16(b) and 924(c)(3)(B). But "'congressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (brackets and citation omitted), including this one. Particularly once this Court endorsed the ordinary-case categorical approach in *James* v. *United States*, 550 U.S. 192, 208 (2007), subsequent Congresses had little reason to make an affirmative legislative effort to end an approach that appeared to be constitutional and functioned in practice to ensure that many criminals were held responsible for their use of firearms in violent crimes.

c. Respondents' efforts (Br. 35-36) to lump Section 924(c)(3)(B)'s subsection-specific definition of "crime of violence" together with not only Section 16(b), but also various other provisions that contain similar language, illustrates the pitfalls of an undifferentiated and context-free approach to statutory interpretation. Respondents would have this Court declare *all* of those statutes unconstitutional alongside Section 924(c)(3)(B), without any evidence that Congress intended them to incorporate an ordinary-case categorical approach either.

For example, respondents call into question (Br. 26, 32, 35) a portion of the Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, that requires a pretrial detention hearing on the government's motion "in a case that involves * * * a crime of violence," 18 U.S.C. 3142(f)(1)(A), and contains a standalone definition of "crime of violence" that mirrors the one at issue here, 18 U.S.C. 3156(a)(4). Although courts have generally viewed that provision through the pervasive categorical lens, see, *e.g.*, *United States* v. *Singleton*, 182 F.3d 7, 10-11 & nn.3-4 (D.C. Cir. 1999), the language itself does not compel that result, and it is far from clear that Congress intended it. Rather, the legislative history indicates that Congress wanted to empower judges "to make honest and appropriate decisions regarding the release" of pretrial defendants based on an assessment of "offense and offender characteristics," and to permit the detention of defendants who are "demonstrably dangerous." S. Rep. No. 225, 98th Cong., 1st Sess. 5, 7, 10 (1983) (Senate Report); see *id.* at 21.

Other statutes cited by respondents (Br. 35-36) are even more unhelpful to their position. For instance, 18 U.S.C. 4042(b)(3), which requires the Bureau of Pris-

ons to notify local law enforcement of the release of prisoners convicted of "crime[s] of violence (as defined in [S]ection 924(c)(3))," was not enacted until 1994, eight years after Section 924(c)(3)(B). Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. II, § 20417, 108 Stat. 1834-1835. Furthermore, the Bureau of Prisons initially construed it to include offenses that did *not* categorically satisfy Section 924(c)(3)(B)'s "crime of violence" definition; courts disagreed based on their own categorical construction of Section 924(c)(3). See, *e.g.*, *Royce* v. *Hahn*, 151 F.3d 116, 123-124 (3d Cir. 1998). Respondents' reliance (Br. 36) on 18 U.S.C. 25(b) and 119(a) is even further afield, as those statutes not only postdate Section 924(c)(3)(B) but expressly cross-reference *Section 16's* "crime of violence" definition. Court Security Improvement Act of 2007, Pub L. No. 110-177, Tit. II, § 202(a), 121 Stat. 2536 (18 U.S.C. 119); PROTECT Act, Pub. L. No. 108-21, Tit. VI, § 601(a), 117 Stat. 686 (2003) (18 U.S.C. 25).

B. The Constitutional-Avoidance Canon Requires Construing Section 924(c)(3)(B) To Incorporate A Circumstance-Specific Approach

Respondents' insistence that Section 924(c)(3)(B), along with other provisions of the federal criminal code, *must* be interpreted as unconstitutionally vague flouts the well-established canon of constitutional avoidance. See Gov't Br. 44-53. A circumstance-specific approach that avoids constitutional concerns is, at a minimum, "fairly possible," *Nielsen* v. *Preap*, No. 16-1363 (Mar. 19, 2019), slip op. 25 (citation omitted); see *id.* at 11 (Breyer, J., dissenting). Respondents' resistance to the constitutional-avoidance canon rests on both a misperception about the constitutionality of the circumstance-

specific approach and a misunderstanding of the constitutional-avoidance doctrine.

1. This Court made clear in both *Johnson* and *Dimaya* that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather than to "'a judge-imagined abstraction.'" *Dimaya*, 138 S. Ct. at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561). Respondents nevertheless assert (*e.g.*, Br. 42) that basing a defendant's criminal culpability on the risk created by his actual conduct—as many criminal statutes do, see *Johnson* Gov't Br. App. A-B—would itself raise constitutional fair-notice concerns. Thus, while respondents repeatedly tout a bill pending in Congress that would revise Section 924(c)(3)(B) to include "fact-specific language" (Br. 21; see Br. 46), they simultaneously suggest that even that clarifying amendment—along with many other state and federal statutes—would be unconstitutionally vague. Accord National Assoc. of Fed. Defenders (NAFD) Amicus Br. 11-20.

Respondents' mistrust of juries cannot be squared with this Court's repeated observation that a risk-based standard applied to actual facts poses no fair-notice (or other constitutional) concern. "[T]he law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree." *Johnson*, 135 S. Ct. at 2561 (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)); see *Dimaya*, 138 S. Ct. at 1217 (plurality opinion). The Court held the ACCA's residual clause and Section 16(b) unconstitutionally vague precisely *because* those statutes incorporated an ordinary-case categorical approach that "offers significantly *less* predictability than one that deals with the actual . . . facts." *Dimaya*, 138 S. Ct. at 1214-1215 (quoting *Johnson*,

135 S. Ct. at 2561) (emphasis added). Because the circumstance-specific approach to Section 924(c)(3)(B) is "far more precise," *United States* v. *Simms*, 914 F.3d 229, 280 n.6 (4th Cir. 2019) (en banc) (Richardson, J., dissenting), and thus far more "predictabl[e]," *Dimaya*, 138 S. Ct. at 1214, than the ordinary-case categorical approach, it is entirely constitutional.

It is much more consistent with fairness and notice principles to hold a defendant criminally liable for his *actual* conduct, than for the imaginary conduct involved in the judicially invented ordinary case of the crime. Defendants may commit offenses that might "ordinarily" be violent in nonviolent ways. For example, while several courts have held that sex trafficking of a minor, in violation of 18 U.S.C. 1591(a), is a crime of violence under the ordinary-case approach, see *United States* v. *Jackson*, 865 F.3d 946 (7th Cir. 2017), vacated, 138 S. Ct. 1983 (2018), the government has conceded that in certain cases, a jury applying the circumstance-specific approach could find that Section 924(c)(3)(B)'s substantial-risk threshold is not met, Gov't Br. at 37, *Jackson*, *supra* (Oct. 15, 2018) (No. 15-3693). Similarly, while many circuits have held that conspiracy to commit a "crime of violence" is itself a crime of violence under an ordinary-case approach, see *United States* v. *Turner*, 501 F.3d 59, 66 (1st Cir. 2007), cert. denied, 552 U.S. 1243 (2008), conspiracies that remain largely inchoate would not satisfy a circumstance-specific interpretation of Section 924(c)(3)(B), see *Douglas*, 907 F.3d at 16.

As a result, and contrary to respondents' assertion (Br. 42), the circumstance-specific approach would not create "arbitrary-enforcement problems." As discussed above (see pp. 6-7, *supra*), Section 924(c) would not apply "to every felony prosecution where a gun was

found, used, or possessed," Resp. Br. 42. The presence of a gun does not itself make offense conduct that is "by its nature" nonviolent—*e.g.*, hacking into a government database from a home computer—into a "crime of violence." And contrary to the objections of respondents and their amici (Br. 34, 41-42; National Assoc. of Criminal Def. Lawyers Amicus Br. 9), nothing suggests that juries—which are "presumed to follow [their] instructions," *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), and which have resolved "similar questions" "for centuries," *Ovalles* v. *United States*, 905 F.3d 1231, 1250 n.8 (11th Cir. 2018) (en banc)—would be unable to determine the riskiness of a defendant's conduct under Section 924(c).

2. Respondents' efforts to circumvent the constitutional-avoidance doctrine not only advance a constitutional theory that would invite a flood of vagueness challenges to statutes that require juries to gauge the riskiness of real-world conduct, but also misinterpret the doctrine itself. Respondents conflate the constitutional-avoidance canon with the rule of lenity—and then misapply them both.

This Court "adhere[s] to th[e] principle" of constitutional avoidance not to favor criminal defendants, but "'out of respect for Congress, which [the Court] assume[s] legislates in the light of constitutional limitations.'" *Jones* v. *United States*, 526 U.S. 227, 239-240 (1999) (citation omitted); see, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009). The Court has accordingly recognized that criminal statutes should not be interpreted to invite vagueness concerns—even when (unlike here, see pp. 20-21, *infra*) avoiding such concerns would clearly broaden the statute's scope. See, *e.g.*, *United States* v.

Grace, 461 U.S. 171, 176 (1983) (noting that broad construction of statute avoided vagueness concerns); *United States* v. *Culbert*, 435 U.S. 371, 374 (1978) (rejecting narrowing construction that might introduce vagueness); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82 (1932) (refusing to render statute vague by reading exception into prohibitory text).

As the government's opening brief explains (Br. 48-53), the separation-of-powers rationale for constitutional avoidance is furthered by interpreting Section 924(c)(3)(B) in a manner that does not render it unconstitutionally vague. Respondents cannot meaningfully dispute that invalidating Section 924(c)(3)(B) will inundate courts with collateral-review petitions by some of the most dangerous federal prisoners and will frustrate efforts to prosecute current and future violent criminals, notwithstanding Congress's efforts. Respondents attempt to minimize the problem by asserting (Br. 38) that "[m]ost" Section 924(c) crime-of-violence prosecutions "are covered by" the alternative definition in Section 924(c)(3)(A). But they offer no empirical support for that assertion; the government is aware of none; and it disregards Congress's explicit judgment that Section 924(c)(3)(A) alone is insufficient to identify the dangerous criminals who employ firearms in connection with violent crimes. Respondents likewise disregard Congress's judgment when they assert (Br. 38-39) that because such criminals can be prosecuted for their underlying crimes, Section 924(c) convictions are unnecessary to provide sufficient punishment. Congress specifically expressed its desire to combat the use of guns during violent crimes with "an offense *distinct* from the underlying felony," Senate Report 312 (emphasis added), that

requires a mandatory consecutive sentence, see 18 U.S.C. 924(c)(1)(D)(ii); Senate Report 312-313.

Respondents' invocation (Br. 43-44) of the rule of lenity to supersede constitutional avoidance is misguided. First, as respondents note (Br. 44), vagueness and lenity are "related manifestations of the fair warning requirement," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997), which would be ill-served if lenity itself required construing a statute to be unconstitutionally vague. The rule of lenity is a canon of last resort to *resolve* "grievous ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998), not to create it. Second, for reasons discussed above (see pp. 16-18, *supra*), a substantial-risk inquiry that focuses on a defendant's *own* conduct does not raise any fair-warning concerns. To the extent that respondents and their amici claim that defendants would lack fair warning under a circumstance-specific approach simply because it is not the one that lower courts adopted before *Dimaya*, they provide no support for the proposition that the statutory constructions of lower courts would preclude this Court from correcting course. See also p. 23, *infra*.

Third, even assuming some principle required interpreting Section 924(c) to apply to the fewest defendants, regardless of whether that construction would be constitutionally valid, "the 'ordinary case' approach is not inherently 'narrower' than the case-specific approach." *Simms*, 914 F.3d at 280 n.6 (Richardson, J., dissenting). "[S]ome defendants" would be guilty of a Section 924(c) offense under each interpretation who would not be guilty under the other, and particularly in light of the now-apparent vagueness of the ordinary-case categorical approach, one "cannot as an empirical matter rea-

sonably identify" which group is "larger." *Ibid.* (emphasis omitted). Indeed, a defendant who committed an "ordinarily" violent crime in a nonviolent way, but was convicted under Section 924(c) nonetheless, would surely invoke constitutional avoidance and the rule of lenity to urge exactly the circumstance-specific construction that respondents here assert to be implausible.*

C. Respondents' Section 924(c) Convictions Should Be Reinstated

Under the proper circumstance-specific construction of Section 924(c)(3)(B), respondents' convictions should be upheld. Respondents do not seriously dispute that a jury correctly instructed on the circumstance-specific approach to Section 924(c)(3)(B) would have found them guilty. See Gov't Br. 53-54. Instead, respondents contend (Br. 49) that applying the circumstance-specific approach here would create "constitutional violations that resist harmless error analysis." This Court, however, has "recognized that 'most constitutional errors'"—including the only one that occurred here—"'can be harmless.'" *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted).

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* Respondents briefly mention (Br. 52), but do not advance, an "always-a-risk" approach to Section 924(c)(3)(B). See *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment); FAMM Amicus Br. 6-26. Although that approach would be constitutional, it is inconsistent with the statute. The only always-present commonalities among different crimes under the same statute are the statutory elements. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). Had Congress wanted an elements-based inquiry in Section 924(c)(3)(B), it would have modeled it after (or folded it into) the "element[s]"-based inquiry of Section 924(c)(3)(A). See *Russello*, 464 U.S. at 23.

The only error was the failure to submit the crime-of-violence element to the jury, which is subject to harmless-error analysis under *Neder*, 527 U.S. at 8-13. Respondents suggest (Br. 50-51) that *Neder*'s harmless-error analysis is inapplicable, on the theory that the district court here "directed a verdict" on the crime-of-violence element. But *Neder* specifically explains that "conclusive presumptions, which direct the jury to presume an ultimate element of the offense," are subject to harmless-error review. 527 U.S. at 10 (emphasis omitted); see *id.* at 12, 17.

Respondents' attempt (Br. 49-50) to transform the *Neder* error into an error in the indictment is unsound. The "crime of violence element," *Rodriguez-Moreno*, 526 U.S. at 280, of the relevant Section 924(c) offense was alleged in the indictment—including with a cross-reference to the specific facts of the crime. C.A. ROA 17. Thus, even assuming the omission of an element from the indictment were not subject to harmless-error analysis, see *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (reserving that issue), the indictment here was constitutionally valid because it provided adequate notice and enough information to plead double jeopardy to a subsequent prosecution. See *id.* at 108.

Respondents likewise err in suggesting (Br. 50) that the *Neder* error here is akin to "adopt[ing] a[n entirely] different definition of the offense * * * from that given the jury by the trial court," *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966). Contrary to respondents' assertions (Br. 49, 51), they had every incentive and opportunity to contest the facts relevant to the crime-of-violence determination, which were the same facts that established respondents' violations of the Hobbs Act,

18 U.S.C. 1951. Respondents' amici are similarly incorrect in their assertion (NAFD Amicus Br. 21) that affirmance here would impermissibly "punish [respondents] for pre-ruling conduct that would not have violated § 924(c) at the time it was committed." This Court's definitive construction of Section 924(c) would explicate the statute's meaning "before as well as after [its] decision." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994); see, *e.g.*, *Scales* v. *United States*, 367 U.S. 203, 224 (1961) (rejecting defendant's attempt to avoid criminal liability by relying on a construction of the statute that he asserted to be vague). That meaning should not be one that deviates from the traditional rule holding a defendant responsible for his own jury-found acts, hinges criminal liability on a judge-imagined abstraction, and renders the statute unconstitutionally vague.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, or, alternatively, vacated and remanded with instructions to permit a retrial.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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